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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

NO. _____

GULF & SOUTHERN TERMINAL CORPORATION,
Petitioner

-versus-

**SS PRESIDENT ROXAS, HER ENGINES,
TACKLE, ETC.,**
Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fourth Circuit

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Corporation*

QUESTION PRESENTED

Can an American admiralty court, with *in rem* jurisdiction over a foreign vessel, lawfully refuse to enforce an American maritime lien against the vessel, on the ground that comity requires it to find that the maritime lien was extinguished by a foreign bankruptcy court's order to its trustee to sell the vessel free of encumbrances and use the proceeds to pay certain debts, the foreign bankruptcy court having only *in personam* jurisdiction over the bankrupt and its property, and having no *in personam* jurisdiction over the American lienholder, and the trustee's conveyance being recorded and thus effective as to third persons only after the vessel's attachment in the American court?

II

LIST OF PARTIES

Gulf & Southern Terminal Corporation,
plaintiff, appellant, and petitioner

SS PRESIDENT ROXAS, her engines, tackle, etc., *in rem*,
defendant, appellee, and respondent

Philippine President Lines, Inc.,
claimant

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OPINIONS

The opinion of the United States Magistrate, to whom the case was tried in the District Court, consists of Findings of Fact and Conclusions of Law and Memorandum and Opinion, and is printed in the Appendix attached hereto, pp. 6a-17a. The opinion of the Court of Appeals for the Fourth Circuit is printed in the Appendix, pp. 1a-5a. Neither of these has been reported to petitioner's knowledge.

(In view of its importance, the order of the Mexican Court is printed in the Appendix (the English translation) at pp. 20a-25a.)

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on March 10, 1983. No rehearing was sought.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Statute

Title 46, U. S. Code

“§ 971. Persons entitled to lien

Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel. June 5, 1920, c. 250, § 30, Subsec. P, 41 Stat. 1005.”

(The relevant provisions of the Mexican Code are printed in the Appendix, pp. 26a-30a.)

STATEMENT

Petitioner Gulf & Southern supplied stevedoring services in a Texas port to a vessel owned by a Mexican company. The vessel returned to Mexico where its owner became bankrupt. The trustee (“sindico”) informed the bankruptcy court the loaded vessel could not continue its voyage and asked leave to borrow money to unload it

and then to sell it free of encumbrances. The court ordered it sold and for the trustee to disburse the proceeds to certain persons.

The vessel was *not* seized (contrary to the finding made by the Magistrate) but came into the trustee's possession as part of the bankrupt estate. Presumably the trustee disbursed the sale proceeds as ordered, there being no evidence they were paid into a common fund and disbursed among the creditors.

Gulf & Southern was not at any time subject to the jurisdiction of the Mexican courts. It did not appear in the Mexican bankruptcy proceedings. When the vessel returned to the United States it was attached and proceeded against *in rem* to foreclose petitioner's American maritime lien.

Mexican courts proceed only *in personam*, Mexico not having any *in rem* procedures, and under Mexican law a bankruptcy court can only dispose of the interest of the bankrupt in jointly-owned property. It was further testified to without dispute that liens (encumbrances) in Mexican law are only those given by instruments that are placed of record.

The Magistrate, to whom the case was tried, found that the trustee's sale made under the court's order extinguished the lien of Gulf & Southern and held that petitioner recover nothing of the vessel. Judgment, App. p. 18a. This decision was affirmed on appeal.

EXISTENCE OF JURISDICTION BELOW

The provisions of 28 U. S. Code § 1333(1) conferred jurisdiction on the District Court, and of 28 U. S. Code

§ 636(c) on the Magistrate of that Court. Appellate jurisdiction was conferred by 28 U. S. Code §§ 1291 and 636(c)(3).

REASONS FOR GRANTING THE WRIT

As the Court of Appeals recognizes, the maritime lien in the vessel acquired by petitioner under the Maritime Lien Act, 46 U. S. Code § 971, is a property right in the vessel, a right of ownership. This settled admiralty principle is expounded at length in *Merchants National Bank v. Dredge Gen. G. L. Gillespie, etc., et al.*, 663 F.2d 1338 (5 Cir. 1981).

An ownership right in property cannot lawfully be divested except in *in rem* proceedings, in which since the proceeding is *in rem* the world is presumed to have notice and all persons are parties, *The Mary*, 13 U.S. (9 Cranch) 126, 143-44 (1815), or in *in personam* proceedings to which those having ownership in the properties involved are parties, i.e., within the court's jurisdiction and having received lawful notice of the proceedings. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 24 L.Ed. 565 (1878), *Bischoff v. Wethered*, 76 U.S. (9 Wall.) 812, 19 L.Ed. 829 (1870). As put in the latter case of *Bischoff v. Wethered*

" . . . It is enough to say of this proceeding [an English judgment], that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law against property of the defendant there situate, it can have no validity here, even of a *prima facie* character. It is simply null."

Here it is undisputed that petitioner did not appear in the Mexican bankruptcy proceedings and was not subject to the Mexican court's jurisdiction.

Whether it had knowledge of the bankruptcy proceedings or not is therefore immaterial, as this court holds in *Pennoyer v. Neff, supra*.

That the Mexican court did not act *in rem* but acted only *in personam* was testified to without dispute, and as the courts below recognize, Mexican law in fact has no *in rem* procedure. Since the Mexican bankruptcy court acted only *in personam* and had no personal jurisdiction over petitioner its order did not lawfully operate with respect to petitioner's ownership interest in the vessel nor divest it of that interest.

The testimony, likewise undisputed, of the witness expert in Mexican law was that the Mexican bankruptcy court had no power to dispose of the interest in property jointly held of anyone but that of the bankrupt. Such was of course the American law, i.e., the bankruptcy court could not divest the property rights of anyone except those of the bankrupt in jointly owned property, until the 1978 amendment. *Goddard v. Weaver*, 10 Fed. Cas. 513, 514 (Cir. Ct. D. La. 1872); *Maybin v. Raymond*, 16 Fed. Cas. 1223, 1225 (Cir. Ct. S.D. Miss. 1877), *In re Standard Laundry Co.*, 116 F. 476, 478 (9 Cir. 1902). The 1978 amendments to the Bankruptcy Act, 11 U.S.C. § 363(h), have altered the rule, but still the rights of other owners in jointly held property are carefully preserved.

While there are no American cases directly in point to counsel's knowledge, a carefully considered English

appellate decision holds directly contrary to the holdings hereinbelow: In *The Goulandris*, [1927] L.J.R. 85, 17 Aspinall N.S. 209, the court held that the sale of a vessel free of liens under the order of an Egyptian bankruptcy court did not extinguish the English maritime lienor's rights. It is respectfully submitted that this English decision is correctly and justly decided and deserves to be followed.

The logic (indeed wisdom) of the English decision is self-evident: In an admiralty *in rem* proceeding the proceeds from the sale of the ship are placed in a single fund in the court's registry and disbursed under the court's order to those entitled to the proceeds from the ship. In the case of a sale of the bankrupt's assets, the proceeds are commingled and subject to all claims of all creditors, of course in accordance with bankruptcy priorities which may be and usually are quite different from admiralty priorities.

In the instant case, the trustee was told to disburse the proceeds: They were not brought to the court and subjected to the court's and creditors' scrutiny at all.

(Of some importance, by Mexican law the bill of sale could not affect third persons' rights until duly recorded. It was so recorded only after the attachment of the vessel hereinbelow.)

CONCLUSION

In upholding an order divesting petitioner of its property, of a foreign court in an *in personam* proceeding where that court had no jurisdiction either *in personam*

or *in rem*, the courts below have decided federal questions in conflict with applicable decisions of this Court, and petitioner respectfully prays that the decisions below be reversed.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

NO. 82-1447

GULF AND SOUTHERN TERMINAL
CORPORATION,
Appellant,

v.

S. S. PRESIDENT ROXAS, her engines,
tackle, apparel, etc., *in rem*,
Appellee.

Appeal from the United States District Court for the
Eastern District of North Carolina, New Bern Division.

Charles K. McCotter, Jr., U. S. Magistrate.

Argued: December 6, 1982 Decided: March 10, 1983

Before HALL and MURNAGHAN, Circuit Judges, and
MICHAEL,* District Judge.

Robert Eikel (Eikel & Davey on brief) for Appellant;
John Richard Newton (Newton, Harris & Shanklin on
brief) for Appellee.

* Hon. James H. Michael, Jr., United States District Judge for
the Western District of Virginia, sitting by designation.

MICHAEL, District Judge:

This case is before the court on appeal from the United States District Court for the Eastern District of North Carolina at New Bern. Gulf and Southern Terminal Corporation [hereinafter "Gulf"], the plaintiff/appellant, originally brought this admiralty action *in rem* in September of 1980 against a vessel, the S. S. President Roxas, the defendant/appellee, owned by Phillipine President Lines, Inc. Gulf's *in rem* complaint sought to foreclose on certain maritime liens which it had acquired in January of 1980 after furnishing stevedoring services to the vessel. At the time these services had been furnished, however, the vessel, then titled the S. S. Rio Yaqui, was owned by a Mexican corporation called Navimex. In the summer of 1980, Navimex went into bankruptcy pursuant to Mexican law. The vessel was then sold to its current owners "free of encumbrances" by Navimex's trustee in bankruptcy, pursuant to the authorization of the Mexican court.

In the proceedings below, counsel for the current owners of the vessel asserted that Gulf's maritime liens had been extinguished by the Mexican court's authorized sale of the S. S. Rio Yaqui. Gulf countered by claiming that, as a maritime lien holder, it had an ownership interest in the vessel which could be extinguished only in an *in rem* proceeding or in an *in personam* action where the Mexican court had jurisdiction over the lien holder. Since the Mexican court in its bankruptcy proceeding acted *in personam*, and since it had no jurisdiction over Gulf, the appellant contended that its liens were never extinguished and that the decree of the Mexican court purporting to sell the vessel "free of encumbrances"

should not be recognized by American courts. The court below found that although the Mexican bankruptcy proceedings were conducted in an *in personam* form, the "arrest" of the vessel by the Mexican court was sufficient to give the proceedings an *in rem* characterization. Accordingly, the court below found the decree of the Mexican court extinguished Gulf's maritime liens and should be recognized by American courts. We affirm the court's decision.

Both parties below recognize that a maritime lien acquired under the American Maritime Lien Act, 46 U.S.C. § 971, is an ownership interest in the vessel itself. However, it has long been recognized by American courts that a judicial sale of a vessel by a court of a sovereign nation will extinguish a maritime lien where that court has either personal jurisdiction over the lien holder or has acted in a valid *in rem* proceeding. See *Atlantic Ship Supply, Inc. v. M/V Lucy*, 392 F.Supp. 179 (M.D. Fla. 1975), *aff'd*, 553 F.2d 1009 (5th Cir. 1977).

Gulf urges this court to refuse to recognize the Mexican court's decision because its proceedings were *in personam* and it lacked personal jurisdiction over the appellant. While Mexican law does not provide for an explicit *in rem* proceeding, it is apparent that the Mexican court's judicial sale of the vessel employed procedures virtually identical to those which are denominated as an *in rem* proceeding under American law. It is not disputed that the vessel was an asset of the bankrupt, under the control and proper jurisdiction of the Mexican court, nor is it contended that the Mexican court provided any less adequate notice to the world that the vessel was being sold free of liens and encumbrances than that which is

routinely provided in *in rem* actions in American courts. Any assertion of the lien or claim of right to proceeds from the sale should have been brought to the attention of the Mexican court.¹

If this court were to rule that the Mexican decree was not sufficient to transfer title to the vessel free and clear of all liens and encumbrances, we would be overturning hundreds of years of sound maritime precedent. As was noted in the seminal case of *The Trenton*, 4 F. 657 (E.D. Mich. 1888),

The doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description, is the law of the civilized world.

4 F. at 661. Without such protection, *The Trenton* court noted,

No one could possibly know the value of his purchase, for no one could foresee the amount of claims that might be made against the vessel in other countries. It would also compel us to inquire in each case whether such foreign court could have taken cognizance of the claim, either by original proceeding or by petition against the proceeds of sale, and, as the foreign law in each case must be proved as a

1. It is not clear from the record whether the appellant had actual notice of the sale of the S. S. Rio Yaqui, though it is probable that it did. The appellee, in its brief, suggests that even if Gulf had asserted its liens in the Mexican court, it would not have recovered anything, for under Mexican bankruptcy law, secured creditors receive priority over lien claimants with the former being entitled to a full share before the latter may recover anything on its claims. When the S. S. Rio Yaqui was sold by the Mexican court, the proceeds of the sale were first applied to the satisfaction of various secured creditors, leaving little, if any, for lien claimants (Appellee's Brief at 18-19).

question of fact, the errors and confusion into which we should fall will be readily appreciated.

4 F. at 663.

In conclusion, we see no reason to deviate from the sound reasoning of the proceeding below. The vessel having been under the jurisdiction and control of the Mexican bankruptcy court, and that court's proceedings being proper and regular so far as the record shows, we find that court's order entitled to recognition and binding on American courts, as a decree which would in this country be denominated as an *in rem* decree.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
NEW BERN DIVISION

No. 80-0152-CIV-4-A

(Filed April 21, 1982)

GULF & SOUTHERN TERMINAL CORPORATION,
Plaintiff

v.

S. S. PRESIDENT ROXAS, her Engines,
Tackle, Apparel, etc., *in rem*,
Defendant

FINDINGS OF FACT
CONCLUSIONS OF LAW
and
MEMORANDUM AND OPINION

Gulf & Southern Terminal Corporation (Gulf & Southern), a United States corporation, brings this *in rem* admiralty action against a foreign vessel, S. S. PRESIDENT ROXAS, for the enforcement of maritime liens for stevedoring services and supplies. The owner of the vessel, Philippine President Lines, Inc. (President Lines), a good faith purchaser without notice, claims that the maritime liens were discharged by the sale of the vessel free of encumbrances authorized by a Mexican court in a bankruptcy proceeding. This case brings into focus,

and to some extent into conflict, two (2) basic concepts of maritime law: the indelibility of maritime liens and the recognition of foreign *in rem* judicial decrees.

This matter was referred to the undersigned United States Magistrate for all further proceedings, including trial and entry of judgment pursuant to 28 U.S.C. 636 (c). The trial of this case occurred on February 17, 1982 and March 9, 1982, in New Bern, North Carolina. C. R. Wheatly, Jr., Esq., of Beaufort, North Carolina and Robert Eikel, Esq., of Houston, Texas appeared as counsel for the plaintiff. John Richard Newton, Esq., of Wilmington, North Carolina and Howard Miller, Esq., of New York, New York appeared as counsel for the defendant vessel and the claimant, President Lines.

This matter first came on for hearing before this court on February 17, 1982, at which time the plaintiff put on its evidence which consisted of paragraph 5 of the pre-trial order and its sole exhibit, the English translation of certain portions of Mexican law on bankruptcy, navigation and maritime commerce, and commerce.

Defendant's witness, J. Walterio Pinedo, from Mexico City was not available at the time of this hearing, and therefore plaintiff put on its rebuttal witness, Hernandez Romo, an expert in Mexican law, out of turn with the agreement that he could be recalled at the subsequent continuation of the first hearing at the option of the plaintiff.

At the continuation of this matter, which was heard on March 9, 1982, the defendant finished its case, offering four (4) witnesses, including the Executive Vice-President of President Lines and three (3) practicing lawyers from

Mexico City, and qualifying one as an expert in admiralty law and another as an expert in Mexican law. The witness Cervantes was the lawyer who had handled the purchase of the defendant vessel for the President Lines, now owner and purchaser from the Mexican bankruptcy proceeding.

After trial, based on the evidence offered through witnesses and through exhibits of both parties, the court makes the following findings of fact and conclusions of law pursuant to Rule 52, Fed. R. Civ. Pro.

FINDINGS OF FACT

1. This action was commenced on September 18, 1980, with the filing of complaint by Gulf & Southern as plaintiff against the PRESIDENT ROXAS, her engines, tackle, apparel, etc., *in rem*.
2. The vessel was attached on September 20, 1980, on its arrival at the Port of Morehead City, North Carolina. The vessel was released by posting of sufficient bond by the defendant on September 26, 1980.
3. The PRESIDENT ROXAS is a steel, deep-sea, cargo vessel, formerly named the S. S. RIO YAQUI, and at the times complained of by the plaintiff was operated by Navimex S.A. de C.V., a Mexican corporation.
4. On January 14 through 18, 1980, at the Port of Houston, and on January 20 through 23, 1980, at the Port of Freeport, Texas, the plaintiff performed stevedoring services and furnished materials to said vessel, amounting to \$86,895.21 at Houston, and \$28,618.63 at Freeport, for a total of \$115,513.84. That these

charges constituted a maritime lien at that time against the vessel, then named the S. S. RIO YAQUI, the sole question being before this court whether or not the plaintiff lost these liens by reason of the Mexican bankruptcy proceeding wherein this vessel was sold, according to that proceeding, free of all liens and encumbrances, to its now owner, President Lines, of Manila, Philippine Islands.

5. On June 18, 1980, the Chairman of the Board of Directors of Navimex had applied to the Eleventh Judge for Civil Matters of the Federal District Court of Mexico for the declaration of the bankruptcy of Navimex in view of its impossibility to continue its operation due to financial insolvency and the matter was assigned a docket number in the First Clerk's Office of the same court.

6. On June 26, 1980, the bankruptcy of Navimex was declared by the Eleventh Judge for Civil Matters of the Federal District Court of Mexico.

7. Sometime in late June or early July of 1980, President Lines became aware that the vessels, S. S. RIO BRAVO and S. S. RIO YAQUI, then owned by Navimex S.A. de C.V., were under arrest as assets of the bankrupt and were to be sold by the Mexican court. Representatives of President Lines contacted Mexican authorities concerning the vessels. The person contacted was Mr. Carlos Erick Jansen, who was the court-appointed Receiver in the bankruptcy proceeding of Navimex. This contact was made in early July when Mr. Enrique Yap, Executive Vice-President in charge of chartering, purchase and sales, of President Lines, went to Mexico and met with Mr. Jansen. Both Mr. Yap and Mr. Jansen carried on their

business in English, and they met on several occasions. Permission was obtained to inspect the vessels, and representatives of President Lines went to the Port of Tampico, Mexico, where the vessels were under arrest or detention, and inspected the vessels.

8. President Lines, through its representatives, advised the Receiver or Sindico, that it was interested in purchasing provided the vessels to be sold to President Lines were free of liens and encumbrances. President Lines made an initial offer for the vessels, offering \$700,000.00 each, and this offer was subsequently increased to \$725,000.00 each.

9. This offer dated July 22, 1980, was received by the Sindico July 23, 1980. The offer contained the purchase price which was to include any duties, fees, levies, taxes, notarial fees, or charges of whatever nature imposed or required by the Mexican government or any of its agencies or instrumentalities.

10. On July 7, 1980, the office of the Trustee or Receiver brought an incidental proceeding for permission to sell the two (2) vessels owned by the bankrupt, namely the S. S. RIO BRAVO and S. S. RIO YAQUI, which were in possession of the bankruptcy judge at the time. The reasons advanced in support of the request were maintenance expense and decline in value from lengthy detention of the vessels. This application for an interlocutory sale and authorization thereof is similar to Supplemental Rule for Certain Admiralty and Maritime Claims E(9)(b), which reads as follows:

INTERLOCUTORY SALES. If property that has been attached or arrested as perishable, or liable to

deterioration, decay, or injury by being detained in custody pending the action, or at the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing release of the property, the Court, on application of any party or the Marshall, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into Court to abide the event of the action; or the Court may, on motion of the defendant or claimant, order delivery of property to him, upon the giving or security in accordance with these rules.

11. Statutory appraisals were effected by the office of the Trustee and by the bankrupt and submitted to the Eleventh Judge for Civil Matters on July 24, 1980, and July 25, 1980, respectively, amounting to 32,000,200 pesos and 31,000,000 pesos as the value of both ships, respectively.

12. On July 24, 1980, the office of the Trustee submitted to the Eleventh Court for Civil Matters the offer made by President Lines.

13. By its interlocutory decision of August 8, 1980 the court authorized the Trustee to sell the vessels for no less than a stated amount with the understanding the existing mortgages would be paid in accordance to priority under law. The Trustee was authorized to sell the vessels free of encumbrances. He was also authorized to execute the instruments of sale.

14. Pursuant to the authority given to him, the Trustee on August 15, 1980, made with President Lines a contract of purchase and sale of the vessels RIO BRAVO and RIO YAQUI. The instrument sets forth the details

of the contract, but it omits any statement that the vessels are sold free of encumbrances or liens.

15. On August 16, 1980, Mr. Yap for President Lines and the Trustee entered into an addendum to the contract of August 15, 1980, which was not filed with the court, which was in English, and which specifically called for the vessels to be free from all debts, encumbrances, and maritime liens, stipulating that title and ownership are transferred in accordance with the authorization of the court and the Contract of Sale made on August 15, 1980. It was further stated that this addendum was deemed to be fully incorporated in the Contract of Sale mentioned above.

16. The fact that the addendum was not written in Spanish does not invalidate the addendum as a contract between the parties, and in this case, Mr. Jansen and Mr. Yap both spoke English and fully understood contents of such document.

17. Certain instruments incidental to the sale were introduced in evidence by the defendant-claimant, including documents (in English) entitled "Bill of Sale" and "Commercial Invoice," dated respectively August 28 and August 30, both of which state that the vessels are sold "free of any debts, encumbrances and maritime liens."

18. After consummation of the sale, the vessels were released to the President Lines on August 30 or 31, 1980. The RIO YAQUI, renamed by the President Lines the PRESIDENT ROXAS, proceeded from Mexico to the United States, and it was libelled in these proceedings on its arrival September 20, 1980. Under Mexican law, sales of personality including vessels must be formalized

by execution and filing of a notarial act of sale transaction, and the Trustee and the authorized representative of President Lines executed before the notary public in Mexico City such a notarial act on November 4, 1980, the sale of the vessel thus being formalized after its seizure in this instant proceeding.

19. In Mexico, the Civil Court has jurisdiction over civil law and commercial law. Bankruptcy and navigation law are branches of the commercial law. Mexican navigation law is equivalent to admiralty and maritime law in the United States. According to Mexican law, in bankruptcy proceedings, the court has jurisdiction over the assets of the bankrupt and not assets or property of third persons. Mexican law does not recognize *in rem* proceedings per se, but recognizes *in personam* proceedings. In order to subject an asset to a Mexican court decree, the owner of the asset would have to be sued *in personam* and the asset attached.

20. Mexican law does not utilize the term "maritime liens." A maritime lien could receive some status under the Mexican law of privileges and credits. Article 116 of the Law on Navigation and Maritime Commerce establishes the priority (privileges) of credits. Gulf and Southern's claims would be considered under the sixth priority: "The credits obtained by the captain for the . . . maintenance of the boat or for the continuation of the trip."

21. Under Mexican bankruptcy law the priority of payments will be made according to the navigation law priority of Article 116. The Mexican court has the authority to order an interlocutory sale of vessels, free of liens, creating a fund for the benefit of the bankruptcy,

the division of which is subject to the privileges of Article 116.

22. The court authorization for the sale of the vessels does not state that the monies obtained from the sale were to be deposited with the court and disbursed by further order of the court.

23. Under Article 118 of the Law on Navigation and Commerce, the *transfer* of a boat does not discharge former liens. This article applies only to private sales and not judicial sales.

24. Notice of the bankruptcy proceedings complied with Mexican law. The arrests of the vessels were advertised. Notice to the creditors of the bankrupt was made by publication in the official gazette and in newspapers of the place where the bankrupt has its main place of business.

25. According to the record of the bankruptcy proceedings, Gulf and Southern was not included in the bankruptcy's notification list and was not notified of the proceedings.

26. Under Mexican law, Mexico recognizes judicial proceedings and judgments in the United States if the proceedings are regular institution known under Mexican law, not against public policy, and of a court of jurisdiction.

CONCLUSIONS OF LAW

The settled law of the United States grants a supplier of necessities an *in rem* lien interest in the vessel to which the necessities are furnished. 46 U.S.C. Sec. 971, as amended. It is equally well settled that stevedoring

services and supplies such as were here furnished by plaintiff to the RIO YAQUI are such necessities the supply of which affords the supplier maritime lien status. *El Amigo*, 285 F. 868 (5th Cir. 1923), cert. den. 262 U.S. 751, 43 S.Ct. 700; *In re Atlantic, Gulf & Pacific S.S. Co.*, 3 F.2d 309 (D.C. Md. 1923), aff'd. 3 F.2d 438. The plaintiff therefore here acquired a maritime lien on the RIO YAQUI by furnishing the services and supplies, in the total amount of \$115,513.84.

The nature of such a maritime lien has been recently considered carefully and at length in the case of *Merchants Nat. Bank v. Dredge Gen. G. L. Gillespie*, 663 F.2d 1338 (5th Cir. 1981), the court explicitly holding that a maritime lien accords its holder a *property right* in the vessel, which is enforced by an action *in rem*, and that such a property interest is distinct from an *in personam* right.

There can be no doubt, therefore, that the plaintiff by providing the stevedoring services and supplies to the RIO YAQUI acquired an interest in, a property right in, that vessel, and is here entitled to judgment unless its property right was divested from it by the Mexican sale authorized by the Mexican bankruptcy court.

On the principle of comity, American courts will ordinarily recognize as binding decrees of foreign courts having jurisdiction of the parties and of the subject matter. An *in rem* procedure will be recognized as entitled to recognition on the principle of comity because an *in rem* proceeding binds the property and all persons having an interest in it. Thus, *in rem* decrees against vessels by foreign admiralty courts will be recognized as valid by American courts has been authoritatively held in *The*

Trenton, 4 F. 657 (E.D. Mich. 1880), and *Zimmern Coal Co. v. Coal Trading Ass'n of Rotterdam*, 30 F.2d 933 (5th Cir. 1929), as well as the case of *Atlantic Ship Supply, Inc. v. M/V Lucy*, 392 F.Supp. 179 (M.D. Fla. 1975). Inquiry then, must be made into the nature of the Mexican proceedings.

Generally, the proceedings in the bankruptcy in which the vessel PRESIDENT ROXAS was sold appears to be proper and regular. Concern is caused, however, from the facts, that the Mexican court did not create a fund from the sale of the vessels for the benefit of the creditors, nor maintain any such fund for a period of time to permit creditors to present claims against the fund. However, this does not impugn the validity of the Mexican proceedings.

The notice given of the proceedings was sufficient under the Mexican law. The notice is similar to that given in an *in rem* proceeding in the United States and as such complies with the due process requirements of the Fifth Amendment. *Merchants Nat. Bank v. Dredge Gen. G. L. Gillespie, supra.*

The Mexican proceeding began as *in personam* bankruptcy proceedings before the Eleventh Judge for Civil Matters of the Federal District Court of Mexico. Derivative from the Mexican commercial law, that court also has admiralty and maritime jurisdiction. The arrest of the vessel characterized the proceedings as *in rem*, the *res* being in the jurisdiction and under the control of a court having the power to adjudicate its disposition, entitling the court's orders to recognition as *in rem* decrees binding on the entire world. *Atlantic Ship Supply Inc. v. M/V Lucy, supra.* A court having possession of

the property has the inherent power to hear and determine claims respecting the property which has come under its control. *Butler v. Ellis*, 45 F.2d 951 (4th Cir. 1930). The decree of the Mexican court, a court of admiralty and maritime jurisdiction, as well as bankruptcy jurisdiction, in a proceeding characterized as *in rem*, wherein the vessel PRESIDENT ROXAS was sold free of liens, extinguishes plaintiff's antedated maritime liens and is entitled to recognition by this court.¹

Accordingly, the plaintiff shall have and recover nothing of the defendant vessel in this proceeding. The Clerk of Court is directed to enter judgment for the defendant pursuant to Rule 58, Fed. R. Civ. Pro. Costs shall be taxed to the plaintiff.

This the 21st day of April, 1982.

/s/ CHARLES K. McCOTTER, JR.
Charles K. McCotter, Jr.
United States Magistrate

1. While not essential to the court's determination herein, the court does conclude that plaintiff's action is not barred by the doctrine of laches.

APPENDIX C

JUDGMENT ON DECISION BY THE COURT

**UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NORTH CAROLINA**

CIVIL ACTION FILE NO. 80-0152-CIV-4-A

(Filed April 21, 1982)

**GULF & SOUTHERN TERMINAL CORPORATION,
v.**

**S. S. PRESIDENT ROXAS, her Engines, Tackle,
Apparel, etc., *in rem.*,**

JUDGMENT

This action came on for trial before the Court, Honorable Charles K. McCotter, Jr., United States Magistrate, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged, the plaintiff shall have and recover nothing of the defendant vessel in this proceeding. Costs shall be taxed to the plaintiff.

19a

THE ABOVE-JUDGMENT WAS ENTERED TO-DAY, APRIL 21, 1982, AND COPIES MAILED TO:

Mr. C. R. Wheatly, Jr.
Wheatly, Wheatly & Nobles, P. A.
P. O. Drawer 360
Beaufort, North Carolina 28516

Mr. John Richard Newton
Attorney at Law
502 Market Street
Wilmington, North Carolina 28401

Dated at New Bern, North Carolina, this 21st day
of April, 1982.

/s/ J. RICH LEONARD, CLERK
Clerk of Court

By: /s/ GERALD S. ATKINS
Deputy Clerk

APPENDIX D

DEFENDANT'S EXHIBIT 2

(Translation from Spanish)

Mexico, Federal District, August 8, 1980

TAKING UP for INTERLOCUTORY DECISION the BANKRUPTCY OF NAVIMEX S.A. DE C.V. and

I. Whereas by instrument of July 7th last, Carlos Erich Jansen Esq. appeared in his character as trustee in the BANKRUPTCY proceedings of NAVIMEX S.A. DE C.V., declaring as follows:

"1. The two merchant vessels owned by the bankrupt NAVIMEX S.A. DE C.V. namely the M/S RIO YAQUI and the M/S RIO BRAVO, are in the port of Tampico, moored outside the breakwaters, with destination the port of Veracruz and the other with destination South America.

2. The said ships cannot continue their voyage due to lack of money and physical supplies for their navigation.

3. The fuel for the ships and the food for the crew will scarcely be sufficient for the next five days.

4. As the ships cannot continue to their destination until the unloading of the ships is effected in the port of Tampico itself, the wages of the crew members and other expenses will continue accruing.

5. The movement for mooring for unloading and subsequent anchoring will give rise to expenses which together

with the amount for the unloading of both ships are estimated in the amount of 900,000 pesos.

6. The anchorage of the ships after being loaded will result in maintenance expenses and expenses for the watch personnel which the Office of the Harbor Master designates.

7. The insurance policies of the ships expire on the first day of the present month of July, which leaves the said ships unprotected against the risk of collision or sinking due to force majeure, particularly during the time of rains and hurricanes which may cause the loosening of mooring lines and various damage.

8. Maintenance during the prolonged stay of the ships in the anchorage will produce, in addition to the expenses resulting therefrom, a decline in the value thereof and will expose them to losses by pilferage. Non-maintenance of the ships would cause a decrease in their value.

Now therefore, he brings the present incidental proceeding so that the FOLLOWING MAY BE AUTHORIZED:

a) To proceed with the immediate unloading of the ships in the port of Tampico, the undersigned obtaining the loan or loans which are required for this purpose either from private parties or from the Association of Lightermen itself which effects the maneuver, and paying said loans with the initial revenue obtained in accordance with what is set forth below.

b) To authorize the undersigned to obtain loans for the bankrupt in order to pay the expenses which originate from the bankruptcy proceedings as well as to pay the

cost of food of the members of the crew of the ships, at a maximum interest rate of 2% per month, taking into consideration the fact that these loans as well as those mentioned in the preceding paragraph, will have to be paid from the first amounts which are obtained.

c) The immediate sale of the said ships, after appraisal of them, taking into account the risks which have been pointed out in the preceding chapter, in order, with the proceeds from the sale, to be able immediately to pay the debts which arise, in the following order:

a) Payment of the mortgages on said ships in order to be able to effect their sale; there debts are as follows:

RIO BRAVO. THE BANK OF TOKYO (HOLLAND)
\$2,047,500

RIO YAQUI. KYOWA FINANCE HONK KONG
LTD. \$987,500.00

VELA MARITIME (BAHAMA) LTD. \$154,971.86
(PESOS).

b) The payment of the debts which result from the mooring, unloading and anchorage of the ships and other loans mentioned in sub-division "B" above.

c) The payment of the wages of the crew members as from July 1st and for as long as each worker or employee has worked.

d) The payment of the indemnities to which the crew members are entitled in accordance with the provisions of the Federal Labor Law.

e) The payment of the debts which exist towards the Unions which are the holders of the collective bargaining

agreements and which represent the four different branches of work of the maritime crew.

f) The payment of the corresponding indemnities to the employees of the bankrupt, which are not included in paragraph "d" above.

II. By order of July 7th last there was ordered further action on the incidental proceedings brought by the Union and notice was served on the bankrupt, on the trustee and on the Agent of the Public Prosecutor and, Engineer Hugo Garcia Rincon was designated as appraiser of the Trusteeship.

III. In due time the bankrupt of the Intervention and the legal representative were heard and they declared their agreement to the incidental proceedings for sale brought by the trustee and that the bankrupt designate the appraiser desired by it.

IV. The appraiser of the Office of the Trustee rendered an opinion assigning to the two ships involved in the proceedings a total price of 32,200,000 pesos and the appraiser of the bankrupt assigned them a value of 31 million pesos, which appraisal was in due time made known to the parties who are intervening in the present proceedings.

V. By instrument of July 24th last, the trustee of the bankrupt advised the Court that the PHILIPPINE PRESIDENT LINES, INC. offered, through the banks mentioned in the records, the amount of 2,500 pesos, which amount is of course in addition to that which the appraisers assigned to the property.

VI. By instrument of August 6th of the present year, citation issued for the handing down of the interlocutory decree which is to be pronounced.

VII. Taking the foregoing into consideration as well as the provisions of Article 48 sub-division III, 199, 203, 204, 206, 209, 205, 212 and other pertinent articles of the Law on Bankruptcy and Suspension of Payments and Article 106 of the Maritime Navigation and Commerce Law, the trustee of the bankrupt is authorized to sell the merchant vessels or ships known as "Rio Yaqui" and "Rio Bravo" for the minimum amount of 33,132,500 pesos, first of all executing the agreement required by law in order to be able to effect said sale with the Association of the Order of Naval Masters and Pilots of the Mexican Republic and with the Union Association of Engine Room Officers of the National Merchant Marine.

Now therefore and on basis furthermore of Articles 1321, 1322, 1323, 1324, 1325 and other pertinent articles of the Code of Commerce, the following decision is rendered:

FIRST: The incidental proceedings for the sale of property of the bankrupt brought by the trustee of the bankrupt are admitted.

SECOND: The said trustee is authorized to sell, free of encumbrances, the merchant ships known as "Rio Yaqui" and "Rio Bravo" for a minimum amount of 33,132,500 pesos national currency as price of both of them, with the understanding that the mortgages which exist on said ships will be paid within these proceedings in the manner and within the legal period of time and

in accordance with the priority which corresponds to them under law.

THIRD: The trustee is authorized to execute the instruments of sale applicable in the case in favor of the purchasing party.

FOURTH: Let this be made known to the office of the Trustee, the Bankrupt, the Intervention and the Social Representative by personal service.

Thus decided as interlocutory order and signed by the 11th Judge in Civil Matters, Melchor Alejandro Res Vasquez.

I certify to this.

Registered in volume 30 on these (illegible)

August 12, 1980. . . .

APPENDIX E
CODE OF MEXICO
COMMERCIAL CODE
[CODO DE COMERCIO]

Art. 18: The Commerce Registry shall be managed in the main city of the judicial district of the domicile of the merchant, by the office in charge of the Public Registry of Property; in case it does not exist, by the mortgage officers; and in case none of them exist, by the first instance courts.

[Art. 18. El Registro de Comercio se llevara en las cabeceras del partido, o distrito judicial del domicilio del comerciante por las oficinas encargadas del Registro Público de las Propiedad; a falta de estas, por los oficios de hipotecas, y en defecto de unas y otros, por los jueces de primera instancia del orden comun.]

Art. 19: The registration in the commerce registry shall be optional for the individuals devoted to exercising the commerce and compulsory for the corporations and for the boats.

[Art. 19. La inscripción o matrícula en el registro mercantil será potestativa para los individuos que se dediquen al comercio, y obligatoria para todas las sociedades mercantiles y para los buques. Los primeros quedarán matriculados de oficio al inscribir cualquier documento cuyo registro sea necesario.]

Art 21: In the sheet of each merchant or corporation shall be written:

* * *

XVIII. The constitution, modification and cancellation of the liens of any kind, on the boats;

[Art. 21. En la hoja de inscripcion de cada com
merciante o sociedad se anotaran:

* * *

XVIII. La imposicion, modificacion y cancelacion de los gravamenes de cualquier genero que pesen sobre los buques;]

Art. 26: The documents that according to this law shall be registered and they were not registered, shall produce legal effects only between the parties; but not against third parties; third parties may take advantage of them. But if such documents were registered according to the "code civil" in the Registry of Property or mortgage-office, notwithstanding the default of the commerce registry, they shall produce legal effects against third parties, when such documents were referred to land or rights in rem.

[Art. 26. Los documentos que conforme a este codigo deban registrarse y no se registren, solo produciran efecto entre los que los otorguen; pero no podran producir perjuicio a tercero, el cual si podra aprovecharlos en lo que le fueren favorables. A pesar de la omision del registro mercantil produciran efecto contra tercero los documentos que se refieran a bienes inmuebles y derechos reales, siempre que hubieren sido registrados, conforme a la ley comun, en el Registro de la Propiedad o en el oficio de hipotecas correspondiente.]

**LAW OF BANKRUPTCY
[LEY DE QUIEBRAS]**

Art. 268: In the bankruptcy of maritime corporations, the preference of the credits shall be governed by the rules mentioned in the Commercial Code.

[Art. 268. En la quiebra de empresas maritimas, en la graduacion y prelacion de creditos se observaran las reglas establecidas en el Codigo de Comercio.]

**LAW OF NAVIGATION AND
MARITIME COMMERCE**

**[LEY DE NAVEGACION Y
COMERCIO MARITIMOS]**

Art. 96: The Marine Department shall create the Public-National Maritime Registry, in which shall be registered:

* * *

VII. The liens on the boats.

[Art. 96. La Secretaria de Marina establecerá el Registro Público Marítimo Nacional, en el que se inscribirán:

* * *

VII. Los gravámenes sobre los buques;

Art. 116: The following credits shall have privileges on the boat and its accessories:

I. The credits derived out of labor relationships;

- II. The tax credits related to the boat or its navigation;
- III. The expenses for help and salvage;
- IV. The correspondent payment in case of common or gross average;
- V. The credits for indemnity derived out of fouling (collision) of other maritime accidents;
- VI. The credits obtained by the captain for the maintenance of the boat or for the continuation of the trip;
- VII. The mortgages or pledges registered according to the law;
- VIII. The insurance primes.

Art. 116. Tendran privilegios sobre el buque, sus pertenencias y accesorios, en el orden siguiente:

- I. Los creditos dericados de relaciones laborales;
- II. Los creditos a favor del fisco, relativos al buque o a su navegacion;
- III. Los gastos de asistencia y salvamento;
- IV. La cuota que le corresponda en las averias gruesas o comunes;
- V. Los creditos derivados de indemnizacion por abordaje u otros accidentes maritimos;
- VI. Las deudas contraidas por el capitán para la conservacion del buque o para la continuacion del viaje;

VII. Las hipotecas y prendas debidamente registradas;

VIII. Las primas del seguro.]

Art. 117: The credits related to the last trip of the boat shall be preferent to the previous trips.

[Art. 117. Los creditos relativos al ultimo viaje del buque, seran preferentes a los derivados de viajes anteriores.]

Art. 118: The privileges shall not be extinguished in case the property of the boat is transferred to a third person.

[Art. 118. Los privilegios no se extinguiran por cambio de propietario del navio.]